

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOY HANNA,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 233771

Wayne Circuit Court

LC No. 00-006015-01

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of ethnic intimidation, MCL 750.147b. She was sentenced to two years' probation and forty-five days in jail. Defendant now appeals as of right. We affirm.

I. Facts and Procedural History

In September 1999, defendant resided in a condominium complex where John Sarvis owned condominium (hereinafter condo) units. During that time, defendant called Sarvis and inquired whether he had rented the condo next door to defendant to a black person. When Sarvis affirmed that he had indeed rented the condo to a black person, defendant "went ballistic" and screamed angry things at Sarvis. Defendant said that black people were trouble and could not be trusted. Defendant further asserted that a black person would not move into the condos, "she would take care of that." Sarvis recalled that defendant used the word "nigger" more than once throughout this conversation.

On September 28, 1999, before the complainant, Casandra Starkey, moved into the condo, defendant called the complainant at 2:00 a.m. and told the complainant that the residents of the condo complex were all white and did not like blacks, nor did they want the complainant to live there. Defendant informed the complainant that it was a very racist place and provided an example of previous racist activity that had occurred within the complex in order to drive a black resident out. Defendant warned the complainant that if she moved into the condo she "was going to die." Defendant also called the complainant a "nigger" several times during the conversation. Thereafter, defendant continued to call the complainant and harass her, calling her a "nigger" and then hanging up the phone.

Following these threats, the complainant decided not to rent the condo, but returned there to move her things out. While at the condo, defendant appeared at the complainant's door using racial slurs, such as "nigger" and told the complainant that she was stupid, that she was not going to live here, and that "you're gonna die." After the complainant threatened to call the police, defendant left. However, defendant returned to the door, again using the same racial slurs and holding an aerosol spray can. Defendant stated that she would "spray it at [the complainant], kill [her], and [the complainant] was going to die." Defendant further threatened that she was going to spray the complainant in the face and that she would die from Legionnaire's disease. Defendant claimed that the condo was already contaminated with such a disease. While defendant was holding the aerosol can like she was going to spray it, defendant stated, "I will kill you, you black nigger." The complainant slammed the door.

Following a jury trial, defendant was convicted of ethnic intimidation. This appeal followed.

II. Motion for New Counsel

Defendant first argues that the trial court abused its discretion in denying her request for an adjournment in order to retain new counsel. We disagree. The substitution of appointed counsel is within the sound discretion of the trial court. *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993). Similarly, we review a trial court's decision whether to grant a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). The determination of whether a trial court abused its discretion in denying a defendant the opportunity to replace appointed counsel with retained counsel turns on whether there was a bona fide dispute and whether the defendant's request was timely brought and not the result of negligence or a delay tactic. *People v Battles*, 109 Mich App 487, 490; 311 NW2d 779 (1981); *People v Shuey*, 63 Mich App 666, 671; 234 NW2d 754 (1975), citing *People v Charles O Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972). Similarly, when reviewing a trial court's decision to deny a defendant's motion for a continuance to obtain another attorney, we consider the following factors:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Echavarria*, *supra* at 369. See also *Shuey*, *supra*.]

Application of the foregoing factors to the instant case reveals that the trial court did not err in denying defendant's request for an adjournment to retain a new attorney. Defendant's request for an adjournment to retain new counsel came on the first day of trial. The trial court denied defendant's request and proceeded to trial. Although defendant was asserting her constitutional right to counsel, there appears to be no legitimate reason for defendant to assert the right. The record does not indicate that a bona fide dispute existed between defendant and her appointed counsel at that time. Furthermore, because defendant waited until the first day of trial to assert her right, she was negligent. See *Echavarria*, *supra* at 369-370 (trial court did not abuse its discretion in refusing to allow the defendant to be represented by counsel of his choice where the defendant was found negligent in waiting until the day of trial to assert his right to counsel).

Moreover, in light of the fact that defendant was already appointed a second attorney in this case and, as the trial court observed, had a year prior to the day of trial to retain an attorney of her choice, defendant's motion may have been a delay tactic. Accordingly, the trial court did not abuse its discretion in refusing to grant defendant's last-minute request for an adjournment to retain new counsel.

III. Sufficiency of the Evidence

Defendant next argues that the evidence presented was insufficient to support her conviction. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The ethnic intimidation statute states, in pertinent part:

“(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.” [*People v Stevens*, 230 Mich App 502, 505; 584 NW2d 369 (1998), quoting MCL 750.147b.]¹

This Court has previously observed that the statute is satisfied when evidence is presented of an underlying predicate criminal act committed because of racial animosity. *Id.* (citations omitted).

Here, there was ample evidence presented that defendant threatened, by word, to cause physical contact with the complainant and damage to personal property. Further, the evidence of defendant's words and acts provided direct evidence that defendant's threats were made with the specific intent to intimidate or harass the complainant because of her race. Defendant does not appear to dispute these elements. Instead, defendant argues that because she did not spray the aerosol can at the complainant, there is no reasonable cause to believe that either physical contact or damage to property would have occurred. However, contrary to defendant's argument, there was sufficient evidence providing reasonable cause to believe that these acts would occur. The complainant testified that defendant was holding the aerosol can like she was going to spray it, and stated, “I will kill you, you black nigger.” The testimony, viewed in a light most favorable to the prosecution, establishes that there was reasonable cause to believe that physical contact or

¹ The trial court did not instruct the jury with regard to subsections (a) or (b). Therefore, only the elements contained in § 750.147b(1)(c) are relevant and need be addressed on appeal.

damage to property would occur. Defendant threatened to spray the complainant with an aerosol can of Legionnaire's disease. The fact that defendant did not spray the can or whether the can actually contained such a disease is irrelevant. Accordingly, the evidence was sufficient for any rational trier of fact to find that the essential elements of ethnic intimidation were proven beyond a reasonable doubt. *Wolfe, supra*.

IV. Jury Instructions

Finally, defendant raises two challenges to the jury instructions. We find no error in the instructions as given. First, defendant contends that the trial court erred in instructing the jury as to the element of ethnic intimidation regarding threats to cause physical contact or damage to property when there was insufficient evidence to support such an instruction and no reasonable cause to believe that such acts would occur. Because we previously found that there was sufficient evidence presented to allow the jury to conclude that defendant was guilty beyond a reasonable doubt, we likewise find that there was sufficient evidence to support the jury instruction given for the elements of ethnic intimidation. As such, defendant's claim is without merit.

Second, defendant claims that the trial court erred in failing to instruct sua sponte on the lesser cognate offense of assault and battery when such an instruction was supported by the evidence. However, a trial court is not required to instruct the jury on lesser-included offenses unless requested and then only if the requested instructions are supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). In this case, defendant failed to request the instruction she now asserts should have been given sua sponte by the trial court. Indeed, not only did defendant fail to request the instruction or object to the instructions as given, she expressed satisfaction with the jury instructions, thereby waiving the issue on appeal as her approval extinguished any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Because defendant waived the issue, "there is no 'error' to review." *Id.* at 219.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray